

Exhibit 7

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TENNESSEE
3 AT KNOXVILLE, TENNESSEE

3 _____)
4 SNMP RESEARCH, INC. and SNMP)
5 RESEARCH INTERNATIONAL, INC.,)
6 _____)

5 Plaintiffs,)
6 _____) Case No. 3:20-cv-451

6 vs.)
7 _____))

7 EXTREME NETWORKS,)
8 _____))

8 Defendant.)
9 _____))

9
10 **ELECTRONICALLY-RECORDED DISCOVERY CONFERENCE**
11 **BEFORE THE HONORABLE DEBRA C. POPLIN**

11 **Wednesday, November 1, 2023**
12 **1:30 p.m. to 4:05 p.m.**

12 **APPEARANCES:**

13 **ON BEHALF OF THE PLAINTIFFS:**

14 OLIVIA WEBER, ESQ.
15 IRELL & MANELLA, LLP
16 1800 Avenue of the Stars
17 Suite 900
18 Los Angeles, CA 90067

18 JOHN L. WOOD, ESQ.
19 EGERTON, MC AFEE, ARMISTEAD & DAVIS, PC
20 P.O. Box 2047
21 Knoxville, TN 37901-2047

22 **TRANSCRIBED BY:**

23 Teresa S. Grandchamp, RMR, CRR
24 P.O. Box 1362
25 Knoxville, Tennessee 37901
 (865) 244-0454

APPEARANCES: (Continued)

ON BEHALF OF THE DEFENDANTS:

JOHN NEUKOM, ESQ.
SAURABH PRABHAKAR, ESQ.
DEBEVOISE & PLIMPTON, LLP
650 California Street
San Francisco, CA 94108

and

CHARLES B. LEE, ESQ.
MILLER & MARTIN, PLLC (Chattanooga)
832 Georgia Avenue
1200 Volunteer Building
Chattanooga, TN 37402
Defendant: Extreme Networks, Inc.;

ALISON PLESSMAN, ESQ.
HUESTON HENNIGAN, LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Terminated Defendants: Broadcom, Inc.,
and Brocade Communications Systems, LLC

* * * * *

1 It hasn't made a statement about this. And I think that
2 all goes to Extreme's burden and failure to carry it.
3 So that goes all to one e-mail between Avaya and its
4 attorney.

5 The rest of the e-mails that Extreme is
6 withholding, all of them are between Extreme employees
7 and Avaya and Luxoft employees. None of them are
8 lawyers. And, so, to keep these out of evidence, the
9 argument is that the Avaya employees were acting as
10 Extreme's agent and, at bottom, the agency argument
11 isn't applicable. It only applies if there is
12 attorney/client privilege on that underlying e-mail
13 which we believe there is no privilege. It was waived
14 when Avaya disclosed it.

15 But, also, we believe that Extreme is wrong as
16 a legal matter; that Avaya was somehow acting as an
17 agent in connection with the privilege or work product
18 communications.

19 The privilege -- we cited the *Hosea Project*
20 *Movers* case that says the privilege only extends to
21 agents of a lawyer who are employed to provide legal
22 advice. I think one of Extreme's cases backs that up.
23 This is the *Cooey v. Strickland* case out of the Southern
24 District of Ohio. There it observed that privilege
25 includes all the persons who act as the attorney's

1 agents, like secretaries, file clerks, telephone
2 operators, messengers, etcetera, and I think that fits
3 perfectly with the idea in *Hosea* that privilege only
4 extends to agents of lawyers who are employed to provide
5 legal advice. And I don't think there is any reasonable
6 argument that Avaya was employed to provide legal advice
7 on behalf of a lawyer for Extreme.

8 So, Extreme's agency argument not only fails to
9 track the case law, but I think it also fails to track
10 how the agreements that they've pointed to define
11 Avaya's agency role.

12 So, the only agency agreements that Extreme
13 invokes set forth a, quote, "limited agency," end quote.
14 And this expressly carved out the sharing of information
15 that would result in the disclosure of privilege.
16 That's Exhibits 12 and Exhibit 13.

17 In these limited agency agreements, the work
18 was also defined only to include things like processing
19 orders, invoicing, delivering product. And, so,
20 it's -- I think it's clear just from looking at the
21 papers that Avaya's contemplated agent role was just
22 helping smooth over the transition of the sale of one
23 part of Avaya to Extreme.

24 Extreme also invoked the asset purchase
25 agreement, but if you take a look at that, it makes

1 clear in Section 5.02(c) that this particular sale did
2 not obligate either party to waive privilege. I think
3 that's a common -- common term. And it also made clear
4 that each party had to use commercially-reasonable
5 efforts, including by entering into a joint defense or
6 common-interest agreement to permit the disclosure of
7 privileged information. And Extreme and Avaya have not,
8 to our knowledge, ever entered into any such agreement
9 and Extreme did not identify one to us.

10 So, the disclosure of the internal Avaya e-mail
11 between Avaya and its attorney, Richard Hamilton, III,
12 constituted a waiver of the attorney/client privilege.
13 And Extreme has articulated no reason, we believe, why
14 any of the other non-attorney communications between
15 Extreme and two third parties would be subject to any
16 claim of privilege or work product.

17 That's all I have on those two issues. But I
18 can answer any question on this second one that you
19 have.

20 THE COURT: Okay.

21 MS. WEBER: Okay. Thank you, Your Honor.

22 THE COURT: Before you sit down, Ms. Weber, so,
23 I want to go back to, I guess, the three documents you
24 said Extreme for the first time had argued that it had
25 inadvertently produced documents ending in 693, 891 and

1 860. And then they had pointed out that they had
2 referenced those in a sworn interrogatory response.
3 Then 30 days later, those were subject, I guess, to the
4 claw back.

5 So, I guess my question with regard to that, as
6 brought up, whether 502(a) comes into play if there has
7 been an intentional disclosure. If there has, then do
8 we need to look at whether there is the same subject
9 matter; do we need to look at the fairness argument?
10 And, so, I just wanted to raise that question while I
11 had you all here today.

12 MS. WEBER: I appreciate it, Your Honor.

13 I think that -- well, I know we're not making
14 an inadvertent disclosure argument. We -- we've noted
15 that it appears that they have selectivity waived, and
16 based on their intentional citation of three documents
17 pursuant to Rule 33(d) and their disclosure of a letter
18 between -- I think it was Brocade and Broadcom to
19 Extreme stating that the SNMP Research license was not
20 assignable, that's also legal analysis pertaining to
21 SNMP Research that has now been disclosed. And it
22 sounds like that type of contract analysis is also the
23 type of analysis underlying other clawed-back
24 communications based on Extreme's description in the
25 briefing.

1 We'd certainly be happy to brief for Your Honor
2 further whether subject matter waiver is warranted, but
3 I think, at least to the license -- or, sorry; excuse
4 me -- legal analysis regarding the scope of the SNMP
5 license and whether it's assignable, we would -- we do
6 believe that that's been selectively disclosed and the
7 rest should be produced.

8 THE COURT: Okay.

9 MS. WEBER: Thank you.

10 MR. NEUKOM: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. NEUKOM: I do have a few remarks to share
13 before I -- and I can open myself up to questions at the
14 beginning or at the end. Does the Court have a
15 preference?

16 THE COURT: I have my questions, but if you
17 want to go ahead and state your position, that's fine as
18 well.

19 MR. NEUKOM: Okay. I'll try to be brief.

20 As an initial matter, I'd like to provide the
21 Court just a little bit of factual background on this
22 issue, including the claw-back issue, and, more broadly,
23 the disputes that the Court has heard about today.

24 This Court has dealt with an awful lot of
25 discovery dealings in this case going back a couple of

1 has been done, we are aware of Your Honor's decision in
2 the Wolpert case from, I think, about a week ago. There
3 is a very helpful discussion of what does and doesn't
4 constitute selective disclosure.

5 And as I read Your Honor's writing -- I may be
6 on thin ice. As I read Your Honor's writing, there is a
7 discussion of selective disclosure that says, in effect,
8 one is guilty -- those are my words, not the Court's.
9 One is guilty of selective disclosure in a way that
10 you'll be held accountable for, not if you necessarily
11 mention or acknowledge the existence of something, but
12 if you rely upon it for -- and here I am quoting the
13 Court -- "tactical advantage."

14 The idea that we produced documents because we
15 were asked to or we were forced to, the idea that we
16 cited them in an interrogatory answer, in an
17 interrogatory fashioned by opposing counsel in the
18 subject of ongoing demands for greater content, volume,
19 clarity, nothing about that has secured -- I can assure
20 you, nothing about that has secured my client a tactical
21 advantage in this case, and it's pretty distinguishable
22 from that kind of a scenario.

23 THE COURT: So, would it be your position that
24 they were not produced in any way that would go to a
25 defense you're going to assert?

1 MR. NEUKOM: That's right.

2 THE COURT: Okay.

3 MR. NEUKOM: And, look, just to try to salvage
4 a teeny bit of credibility, I will say this: In many
5 cases that line of questioning from the Court could open
6 up some sometimes awkward discussions about the timing
7 of production and the timing of the claw back.

8 In this case, due to the terms of the
9 protective order, we don't have that debate. The
10 parties here have mutually agreed and the Court has
11 ordered that when there is going to be a snapback --
12 right? -- we're not going to get into those other
13 questions.

14 But that doesn't go to the selective disclosure
15 question. That might go to a diligence or a timeliness
16 question, which thankfully here, due to the protective
17 order, both sides specifically are protected from those
18 kinds of questions.

19 THE COURT: Okay. Thank you.

20 MR. NEUKOM: Thank you, Your Honor.

21 MS. PLESSMAN: Your Honor.

22 THE COURT: Yes, Ms. Plessman.

23 MS. PLESSMAN: There have been a number of
24 questions and oral argument relating to Broadcom or
25 Brocade's waiver.

1 view of the law, we think they haven't met their burden
2 to show the common-interest doctrine is extended here.

3 THE COURT: Okay.

4 MS. WEBER: Thank you.

5 THE COURT: All right. Well, I'm going to take
6 a brief recess to see if there is any other questions I
7 need to ask before we conclude today. So, we'll stand
8 in a brief recess.

9 THE COURTROOM DEPUTY: All rise. This
10 honorable court stands in recess.

11 (A brief recess was taken.)

12 THE COURT: Okay. Before we recess for the
13 day, I do want to request supplemental briefing on three
14 topics, and I want all three topics addressed in
15 one -- your one briefing document that for each side is
16 a limit of 25 pages.

17 So, these are the three issues: First, whether
18 Extreme, in responding to the interrogatory request,
19 whether that operated as an intentional waiver of the
20 privilege, and, of course, if so, go through the 502(a)
21 factors, include that. Second, whether there was a
22 transfer of privilege from Avaya to Extreme. And,
23 third, I want you to address the claim of privilege with
24 respect to Avaya's employee communications because I
25 didn't -- I feel like I didn't hear enough about that

1 MR. LEE: Your Honor, procedurally -- or, go
2 ahead.

3 MR. NEUKOM: Sorry. Is this the stuff that we
4 discussed?

5 MR. LEE: Yes.

6 MR. NEUKOM: I'm comfortable with that for now.

7 MR. LEE: Okay. All right.

8 MR. NEUKOM: I have one question, which is: I
9 think I have a very clear understanding of what Your
10 Honor would like us to address with points one and
11 number two.

12 THE COURT: Yes.

13 MR. NEUKOM: If you asked me to repeat back
14 what we should address on point number three, I don't
15 think I could do a very good job of it. So, may I ask
16 the Court just to -- even if it's saying the same thing
17 all over again --

18 THE COURT: Yes, it's with respect to the
19 employee communications. As the way I understood from
20 the position statements, I need to consider perhaps
21 whether those communications between the employees were
22 done at the direction of or for information that was
23 going to go back to Mr. Hamilton as legal counsel. And,
24 so, I need to -- I need to understand more about the
25 communications amongst the employees and why those were

1 taking place.

2 MR. NEUKOM: Understood. So, is it scenario
3 one, two employees, non-lawyers, e-mailing about a new
4 product launch that's not privileged?

5 THE COURT: Right.

6 MR. NEUKOM: Is it, instead, two employees
7 doing something covered by privilege?

8 THE COURT: Collecting -- were they directed to
9 collect information that was going back to be used by
10 legal counsel.

11 MR. NEUKOM: Understood. Thank you.

12 THE COURT: Okay. All right. Anything further
13 on behalf of SNMP?

14 MR. WOOD: Nothing from plaintiffs, Your Honor.

15 THE COURT: Okay. All right. Thank you for
16 your presentations today.

17 MR. WOOD: Thank you.

18 MR. NEUKOM: Thank you.

19 MR. LEE: Thank you, Your Honor.

20 THE COURTROOM DEPUTY: All rise. This
21 honorable court stands adjourned.

22 (Which were all the digitally-recorded
23 proceedings had and herein transcribed.)

24 * * * * *

25

1 C-E-R-T-I-F-I-C-A-T-E

2 STATE OF TENNESSEE

3 COUNTY OF KNOX

4 I, Teresa S. Grandchamp, RMR, CRR, do hereby
5 certify that I reported in machine shorthand the above
6 digitally-recorded proceedings; that the foregoing pages
7 were transcribed, to the best of my ability to hear and
8 understand the recorded file, under my personal
9 supervision, and constitute a true and accurate record
10 of the digitally-recorded proceedings.

11 I further certify that I am not an attorney or
12 counsel of any of the parties, nor an employee or
13 relative of any attorney or counsel connected with the
14 action, nor financially interested in the action.

15 Transcript completed and signed on Tuesday,
16 November 7, 2023.

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TERESA S. GRANDCHAMP, RMR, CRR
Official Court Reporter